JD(SF)–79–02
Kirksville, MO

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

HOLLISTER, INC.

and Case 17-CA-21453

INTERNATIONAL UNION, UNITED
AUTOMOBILE, AEROSPACE &
AGRICULTURAL IMPLEMENT WORKERS
OF AMERICA-UAW, LOCAL 710

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Chicago, IL, for Respondent.

DECISION

Statement of the Case

JAY R. POLLACK, Administrative Law Judge: I heard this case in trial at Kirksville, Missouri, on August 27, 2002. On November 27, 2001, International Union, United Automobile, Aerospace & Agricultural Implement Workers of America – UAW, Local 710, (the Union) filed the charge alleging that Hollister, Inc., (herein called Respondent) committed certain violations of Section 8(a)(3) and (1) of the National Labor Relations Act, as amended (29 U.S.C. Section 151 et seq., herein called the Act). On February 1, 2002, the Acting Regional Director for Region 17 of the National Labor Relations Board issued a complaint and notice of hearing against Respondent, alleging that Respondent violated Section 8(a)(3) and (1) of the Act by allowing two non-members of the Union to work while Respondent was locking out its production and maintenance employees represented by the Union.

The parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. Upon the entire record, from my observation of the demeanor of the witnesses,[1] and having considered the briefs submitted by the parties, I make the following:

Findings of Fact and Conclusions

I. Jurisdiction

Respondent is an Illinois corporation, with an office and principal place of business in Kirksville, Missouri, where it was engaged in the manufacture of medical devices. During the 12 months prior to issuance of the complaint, Respondent purchased and received in Missouri goods valued in excess of $50,000 directly from points outside the State of Missouri. Accordingly, Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

Respondent admits I find that at all times material herein the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II The Alleged Unfair Labor Practices

A. The Facts

The Union has represented Respondent's hourly production and maintenance employees at Respondent's Kirksville facility since 1973. The Union and Respondent have been party to a series of collective-bargaining agreements, the most recent of which expired on November 9, 2001.

On November 9, 2001, the bargaining unit employees voted to reject the Respondent's last, best and final offer for a successor collective-bargaining agreement. On November 10, 2001, the parties met once again but were unable to make any progress towards a new bargaining contract. At the November 10 meeting, Respondent notified the Union that operations would be suspended over the weekend. The parties met a second time on November 11 with a federal mediator. The parties were still unable to make any progress towards an agreement and the federal mediator called for a cessation of negotiations and a cooling-off period. Respondent then presented the Union with the following statement declaring a lockout:

> Hollister Incorporated announced today that, for an indefinite period of time, no work would be available at its Kirksville facility for Union employees, commencing Monday, November 2, 2001. Hollister's labor agreement expired Friday, November 9th. Although Hollister believes it made a fair offer providing for improved wages and benefits, the offer was unfortunately not accepted. Rich Scott, Kirksville Plant Manager, stated today that there had been insufficient progress made in negotiations and that at this time the

[1] The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Manufacturing Company,* 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings herein, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence or because it was in and of itself incredible and unworthy of belief.

Company did not want to continue full work operations without a new labor agreement. Hollister will run selected operations utilizing non-union workers for the time being, and remains ready to continue good faith negotiations.

During the lockout, Respondent operated the facility utilizing supervisors and non-unit employees. However, Respondent also utilized two of the four employees in its plate department. These two employees, Judy Harlan and Sherry Treasure, were the only non-members of the Union in the bargaining unit of 323 employees. Respondent admits that it knew Harlan and Treasure were not members of the Union but contends that it employed them during the lockout for legitimate business reasons and not to discourage Union membership. The lockout continued until December 2, 2001, when a new agreement was ratified and the bargaining unit employees returned to work.

About July or August 2001, Jim Rudebeck, Respondent's human resources manager, prepared a contingency plan in the event of a strike. As a part of the contingency plan, Rudebeck made a list of management and administrative personnel who would be employed during a strike. He listed supervisors and managers by name. He also listed two bargaining unit employees, whom he described as "Core Members." These two employees, Judy Harlan and Sherry Treasure, had, several years prior to 2001, resigned their membership from the Union and had exercised their rights under *Communications Workers of America v. Beck*, 487 U.S. 735 (1988).[2] Harlan and Treasure, pursuant to the *Beck* case, chose to refrain from financial support of Union activities beyond those germane to collective bargaining. Harlan and Treasure were the only two bargaining unit employees who were not members of the Union. Rudebeck admitted knowing that these two employees were the only non-members of the Union (Beck objectors or core members) in the bargaining unit.

During the lockout, Respondent utilized the staffing contained in Rudebeck's strike contingency plan. Harlan and Treasure worked the entire three-week period of the lockout. Treasure worked her regular shift and an additional 85 hours of overtime. Harlan worked her regular shift and an additional 102 hours of overtime. Harlan worked 40% of her time in the plate room and 60% of her time performing work in the production area. Treasure also worked in the production area and, being less experienced than Harlan, probably worked no more than 60% of her time in the plate room. There were two other plate room operators, Jeannie Marsh and Kelly Stockdale. Marsh and Stockdale were Union members and were not offered the opportunity to work during the lockout. As stated above, Treasure and Harlan were the only two bargaining unit employees who were not included in the lockout. All the production employees were locked out and replaced by supervisors, managers, and Harlan and Treasure.

In Respondent's defense, Rudebeck testified that custom work required the staffing of the plate room. He testified that custom work was more than 50% of the work in the plate room and, therefore, more than one employee was required to do the work during the lockout. Rudebeck testified that Respondent had no supervisor or manager capable of doing this work. He further testified that Harlan and Treasure were on the strike contingency plan because they would work during a union strike. Rudebeck further testified that Harlan and Treasure were more experienced and more capable than Stockdale and Marsh. According to Rudebeck, aside from Treasure and Harlan, no other member of the bargaining unit was necessary to avoid customer service

[2] The collective-bargaining agreement contained a union security clause which clause required that all bargaining unit employees be members of the Union. Harlan and Treasure have asserted their rights under *Beck* to refrain from paying union dues other than those required to retain their employment.

interruptions. Harlan and Treasure performed production work when there was not enough pressroom work for them to perform. Respondent apparently argues that they worked overtime because the supervisors and managers were working overtime.

B. Conclusions

The General Counsel argues that under the Supreme Court's decision in *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967), Respondent's conduct herein was inherently destructive of the union employees' Section 7 rights. In *Great Dane Trailers*, the Supreme Court stated the following framework for assessing employer motivation for discriminatory conduct:

> First, if it can reasonably be concluded that the employer's discriminatory conduct was "inherently destructive" of important employee rights, no proof of an antiunion motive is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is "comparatively slight, an antiunion motivation must be proved to sustain the charge" if the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. Thus, in either situation, once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to some extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him. 388 U.S. at 34.

It has been settled law that an employer does not violate the Act by locking out its bargaining unit employees temporarily for the sole purpose of pressuring them to accept its bargaining proposals. *American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965). General Counsel further argues that under *Schenk Packing Co.,* 301 NLRB 487 (1991), Respondent's conduct was inherently destructive of employee Section 7 rights because Respondent locked out all the Union members and permitted the only two bargaining unit employees who were not Union members to work during the lockout.

In *Schenk Packaging,* the Board found that the respondent-employer's memorandum declaring a lockout clearly stated that union members would not be hired as replacements during the lockout, and that unit employees would be considered for employment only if they resigned from the union. Further, during the course of the lockout, the respondent-employer reinstated 10 unit employees who did resign from the charging party-union, while those who remained union members continued to be deprived of their employment. Therefore, the Board decided that an unavoidable effect and unstated purpose of the lockout was to discourage unit employees' membership in the union by denying employment to those who maintained that status. Accordingly, the Board found that the respondent-employer's conduct violated Section 8(a)(3) and (1).

In *Central Illinois Public Service Co.,* 326 NLRB 928 (1998), the Board found that the respondent-employer did not violate the Act by locking out its employees in response to a union's "inside game strategy." The union's inside game strategy was to have unit employees refuse to work overtime and to work with strict adherence to work rules in order to put economic pressure on the company to reach a contract. First, the Board held a lockout for the purpose of applying pressure on a union during a bargaining dispute is not "one of those acts which are demonstrably so destructive of collective bargaining that the Board need not inquire into employer motivation." Secondly, the Board held that, an employer is and should be free to exert any force that it has as its only effect compelling the union to yield in a current dispute. Thus, the Board decided that if

forcing the union to end its inside game in support of its bargaining demands was the respondent-employer's only purpose, it constituted a legitimate and substantial business justification for the lockout.

Further, the Board found that the respondent-employer also sought resolution of bargaining issues that were dividing the parties in their bargaining negotiations. The Board then held that application of economic pressure in support of an employer's bargaining position constituted a legitimate and substantial business justification for a lockout within the meaning of *Great Dane*.

As mentioned above, an employer may lockout its employees if its motive is solely to pressure their union to accept the employer's bargaining proposals, *American Shipbuilding Co. v. NLRB*, 380 U.S. 300 (1965); *Central Illinois Public Service Co.,* 326 NLRB 928 (1998). Respondent's motive for the lockout is clear. Respondent knew that the Union had rejected its final offer and was preparing to strike. It was, therefore, perfectly legitimate for Respondent to lock out its employees in support of its bargaining demands.

The issue in this case is whether Respondent violated the Act by allowing the only two non-union employees to work during the lockout. Respondent offered legitimate business reasons for needing two employees in its plate room. However, I find Respondent chose these employees based on Union membership. First, Respondent stated that no work would be available for "Union employees" and that it would run selected operations "utilizing non-union workers." Further, in its staffing chart, Respondent referred to the plate room employees as "core members", thus referring to the status of the two employees as non-members of the Union. Therefore, I find that an unavoidable effect and unstated purpose of the failure to let the two plate room operators who did not belong to the Union to work during the lockout was to discourage Union membership or to encourage non-membership in the Union (*Beck* objector status). Accordingly, I find that Respondent's conduct violated Section 8(a)(3) and (1).

General Counsel relying on *Schenk Packing, supra,* argues that Respondent should be found liable for locking out all 321 Union employees, while permitting Harlan and Treasure to work. I find that *Schenk Packaging* is distinguishable. In *Schenk Packaging*, the respondent-employer declared a lockout, clearly stated that union members would not be hired as replacements during the lockout, and that unit employees would be considered for employment only if they resigned from the Union. Further, during the course of the lockout, the respondent-employer reinstated ten unit employees who did resign from the charging party-union, while those who remained union members continued to be deprived of their employment. Thus, the respondent in *Schenk Packaging* took steps that inherently rewarded non-members of the charging party-union and discriminated against members of that union at the outset of the lockout. That respondent enticed employees to resign from the union and rewarded those employees who did resign from the union.

Respondent, in this case, locked out employees to put pressure on the Union during negotiations but took no steps to encourage employees to resign from the Union or to invoke their *Beck* rights. Here, Respondent had a legitimate and substantial business justification for its lockout of employees but erred in allowing two employees, it deemed essential, to work while denying the same opportunity to two similarly situated Union members. Thus, I find Respondent only violated the Act in not considering Marsh and Stockdale for employment during the lockout based on their Union membership.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By locking out the Union members in its plate room and allowing non-members of the Union to work during the lockout, Respondent violated Section 8(a)(3) and (1) of the Act.

4. The above unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action to effectuate the policies of the Act.

I shall recommend that Respondent make whole Jeanie Marsh and Kelly Stockdale, for any and all loss of earnings and other rights, benefits and privileges of employment they may have suffered by reason of Respondent's discrimination against them, with interest. Backpay shall be computed in the manner set forth in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987); See also *Florida Steel Corp.*, 231 NLRB 651 (1977) and *Isis Plumbing Co.*, 139 NLRB 716 (1962).

I shall also recommend that Respondent remove from its files any reference to the unlawful lockout as it pertains to Marsh and Kelly and notify each employee in writing that this has been done and that the lockout will not be used against him or her in any way.

Upon the foregoing findings of fact and conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended: [3]

ORDER

Respondent, Hollister, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in the Union by locking out employees who are union members and by permitting non-union employees in the same department to work during the lockout, or in any other manner discriminating against employees with respect to wages, hours, or terms and conditions of employment.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

[3] All motions inconsistent with this recommended order are hereby denied. In the event no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Make whole Jeanie Marsh and Kelly Stockdale who were unlawfully locked out from November 21, 2001, until December 3, 2001, for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this Decision and Order.

(b) Remove from its files any reference to the unlawful lockout as it pertains to Marsh and Kelly and notify each employee in writing that this has been done and that the lockout will not be used against him or her in any way.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its Kirksville, Missouri, facility copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 21, 2001.

(e) Within 21 days after service by the Region, file with the Regional Director, a sworn certification of a responsible official on a form provided by the Region attesting to the steps Respondent has taken to comply.

Dated, San Francisco, California, October 15, 2002.

_____
Jay R. Pollack
Administrative Law Judge

[4] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX
NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a hearing at which all sides had a chance to give evidence, the National Labor Relations Board has found that we violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, and has ordered us to post and abide obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT discourage membership in International Union, United Automobile Aerospace & Agricultural Implement Workers of America, UAW, Local 710 by locking out employees who are Union members and permitting non-members of the Union in the same department to work, or in any other manner discriminate against employees with respect to wages, hours, or terms and conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make whole Jeanie Marsh and Kelly Stockdale who were unlawfully locked out from November 21 until December 3, 2001, for any loss of earnings and other benefits suffered as a result of the discrimination against them.

WE WILL remove from our files any reference to the unlawful lockout as it pertains to Marsh and Stockdale and notify each employee in writing that this has been done and that the lockout will not be used against him or her in any way.

HOLLISTER, INC.

Date _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

8600 Farley Street, Suite 100, Overland Park, KS 66212-4677

(913) 967-3000, Hours: 8:15 a.m. to 4:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (913) 967-3005.